(9)

FILED
DEC 29 1997
CLERK

No. 97-288

IN THE

Supreme Court of The United States

OCTOBER TERM, 1997

VICKY LEWIS, *et al.*,

Petitioners,

v.

BRUNSWICK CORP.,

Respondent.

On Writ of *Certiorari* to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF *AMICUS CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C., IN SUPPORT OF PETITIONERS

Leslie A. Brueckner, Esq.
(Counsel of Record)
Arthur H. Bryant, Esq.
Trial Lawyers for Public Justice, P.C.
1717 Massachusetts Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 797-8600

Counsel for *Amicus Curiae*

December 29, 1997

---

36 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 2

A. The Coast Guard's Decision Not To Regulate Propeller Guards 2

B. The Proceedings Below 6

SUMMARY OF ARGUMENT 6

ARGUMENT:

THE COAST GUARD'S DECISION NOT TO REGULATE PROPELLER GUARDS DOES NOT PREEMPT PETITIONERS' COMMON-LAW CLAIMS 8

I. Under *Myrick*, The Coast Guard's Decision Not To Regulate Propeller Guards Leaves The States Free To Act As They Wish 8

II. Even If The Coast Guard's Decision Not To Regulate Propeller Guards Preempts State Regulation, It Does Not Expressly Or Impliedly Preempt Petitioners' Common-Law Claims 17

A. Petitioners' Claims Are Not Expressly Preempted Because Congress Expressly Preserved Them 17

1. The Boat Safety Act's Preemption Provision Does Not Encompass Common-Law Claims 17

2. The Boat Safety Act's Savings Clause Expressly Preserves Common-Law Claims 20

B. The Question Of Implied Preemption Cannot Be Reached Because Congress Unambiguously Preserved Common-Law Claims 24

C. Even Assuming That Implied Preemption Analysis Can Be Reached Here, Petitioners' Claims Are Not Preempted Because They Do Not Conflict With Federal Law 26

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: **Page:**

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 19

Arkansas Elec. Co-Op v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983) 11

Boyle v. United Technologies Corp., 487 U.S. 500 (1988) 14

California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272 (1987) 9

Carstensen v. Brunswick Corp., 49 F.2d 430 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 182 (1995) 23

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1993) 1, 23, 24, 26

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 18

English v. General Electric Corp., 496 U.S. 72 (1990) 9

Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963) 13, 14

Freightliner Corp. v. Myrick, 115 S. Ct. 1483 (1995) . . . . . *passim*

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 23

Hillsborough County, Fla. v. Auto Med. Labs., 471 U.S. 707 (1985) 14, 15, 27

Hines v. Davidowitz, 312 U.S. 52 (1941) 14

Medtronic v. Lohr, 116 S. Ct. 2240 (1996) . . . . . *passim*

Moore v. Brunswick Bowling & Billiards Corp., 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994) 18, 29-30

Morrison-Knudsen Const. v. Director, Office of Workers Comp. Programs, 461 U.S. 624 (1983) 18

Mowery v. Mercury Marine, 773 F. Supp. 1012 (N.D. Ohio 1991) 23

Paccar, Inc. v. NHTSA, 573 F.2d 632 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978) 10

Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 496 (1988) 11

Rice v. Santa Fe Elevator Corp., 337 U.S. 218 (1947) 8, 13, 14

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 14

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) . . . 9

United States v. James, 478 U.S. 597 (1986) 21

Statutes and Regulations:

5 U.S.C. § 553 (1994) 5

National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1982) 10

Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301 *et seq.* (1988 & Supp. V. 1993) . . . . . *passim*

46 U.S.C. § 4302(a)(1) 3, 13, 18

46 U.S.C. § 4302(a)(2) 18

46 U.S.C. § 4302(c)(4) 3

46 U.S.C. § 4304 18

46 U.S.C. § 4306 . . . . . *passim*

46 U.S.C. § 4311(f)(1) 18

46 U.S.C. § 4311(f)(2) 18

46 U.S.C. § 4311(g) . . . . . *passim*

49 C.F.R. § 571.121(S3) (1993) 10

Legislative History:

S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333 . . . . 15-16, 22, 29

INTEREST OF *AMICUS CURIAE*[1]

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. Through involvement in precedent-setting and socially significant litigation, TLPJ seeks to ensure that tort law fully serves its dual purposes -- compensating those injured by wrongful conduct and deterring similar conduct in the future. TLPJ is gravely concerned that, if the tort system is closed to innocent victims of unguarded boat propellers through improper application of the preemption doctrine in this case, neither of these purposes will be served.

This case, moreover, has implications far beyond the narrow issue of preemption under the Federal Boat Safety Act of 1971. If the decision below is permitted to stand, it could massively broaden the scope of federal preemption far beyond what Congress ever intended. Under the Eleventh Circuit's reasoning, *any* federal decision not to regulate could be deemed to have preemptive force, regardless of the reason for federal inaction and regardless of the extent to which Congress made clear its intent *not* to intrude on the States' regulatory powers and/or strip individuals of their common-law remedies. This approach turns the "strong presumption against pre-emption," *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1993), on its head and creates, in its place, a powerful presumption in *favor* of federal preemption that arises simply by virtue of agency *in*action. Not only would this constitute a grievous blow against the traditional rights of victims to seek redress for

---

[1] Letters of consent to the filing of this brief have been filed with the Clerk. No counsel for either party authored the brief in whole or in part, and no person or entity other than *amicus curiae* made any monetary contribution to its preparation or submission.

injuries caused by dangerous products, but it would strip States of their historic power to protect the health and welfare of their citizens. Reversal is appropriate to prevent this deep encroachment on the rights of States to protect their citizens and the rights of citizens to use the common law to protect themselves -- rights that neither Congress nor the Coast Guard ever expressed any intention to restrict.

STATEMENT

This case presents the question of whether a claim that a boat engine was defective because it lacks a propeller guard is preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301 *et seq.* (1988 & Supp. V. 1993) ("Boat Safety Act" or "Act"), and by a decision by the United States Coast Guard *not* to issue regulations requiring propeller guards on all motor boats. The Eleventh Circuit held that such claims are impliedly preempted by the Act, even though: (1) there is no federal regulation or standard relating to propeller guards; (2) the Boat Safety Act's preemption provision only applies where there has been "a [federal] regulation prescribed under section 4302 of [the Act]," 46 U.S.C. § 4306; and (3) the Act's savings clause provides that compliance with any such regulations issued thereunder "does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). That decision is in direct conflict with *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), and cannot be reconciled with the plain language of the Boat Safety Act, which expressly preserves *all* common-law claims.

A. The Coast Guard's Decision Not To Regulate Propeller Guards.

In recent years, public attention has become increasingly focused on motor-boat propellers "as instruments of devastation that are injuring and killing large numbers of people." Joint

Appendix ("J.A.") 174. Propeller-related injuries "are often characterized by massive trauma, including significant blood loss or death." J.A. 170. Between 1976 and 1990, the Coast Guard officially reported 175 fatalities and 1,438 non-fatal injuries in its *Boating Statistics* category "struck by boat or propeller" -- an average of approximately 100 per year. *Id.*

The injuries associated with unguarded boat propellers have given rise to numerous lawsuits against marine engine manufacturers since the 1970s. J.A. 239. However, despite this litigation, as of 1992, no major marine engine manufacturer had equipped any of its boats with any type of propeller guard to protect people in the water. *Id.*

The growing public controversy over the use of propeller guards led the Coast Guard to consider whether to begin the process of developing a federal regulation mandating their use on passenger boats. Under the Boat Safety Act, the Coast Guard has the authority to "prescribe regulations establishing minimum safety standards" for recreational boats. 46 U.S.C. § 4302(a)(1). The National Boating Safety Advisory Council (the "Advisory Council") is charged with assisting the Coast Guard in evaluating the need for safety regulations. *See id.* § 4302(c)(4). In 1988, at the Coast Guard's request, a subcommittee of the Advisory Council (the "Subcommittee") was formed to investigate the feasibility of requiring guards to prevent underwater propeller accidents. *See* J.A. 46.

In November 1989, the Subcommittee recommended that the agency take no regulatory action regarding propeller guards. Although it recognized the hazards presented by unguarded boat propellers, it found that

> [n]o simple universal design suitable for all boats and motors in existence has been described or demonstrated to be technologically or economically feasible. To retrofit the

> some 10 to 15,000,000 existing boats would thus require a vast number of guard models at prohibitive cost.

J.A. 71. *See also* J.A. 73 ("there are no indications that there is a generic or universal solution currently available or foreseeable in the future.") Thus, the Subcommittee concluded that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." *Id.*[2]

The Advisory Council subsequently adopted the Subcommittee's recommendation that the Coast Guard not issue regulations requiring propeller guards on all recreational boats. J.A. 138. However, in response to a presentation by a propeller strike victim that the search for new technology should continue, the Advisory Council's Chair "assured the Council and guests that this is not a dead issue. If new pertinent information becomes available, a subcommittee will be reconvened." J.A. 139.

On February 1, 1990, the Coast Guard adopted the Advisory Council's recommendation that it "take no regulatory action to require propeller guards." J.A. 163. In a letter memorializing its decision (the "Coast Guard Letter"), a Coast Guard official reiterated the concern that there was no universal solution currently available to solve the propeller guard problem:

---

[2] In its report, the Subcommittee also discussed that "[a] number of lawsuits have been filed by victims of alleged propeller strikes to recover damages from the operator of the striking vessel and also against the manufacturer of the propulsion unit and/or boat." J.A. 50-51. The Subcommittee went on to note that, if the Coast Guard were to adopt a regulation mandating propeller guards, "[s]uch mandate would . . . establish prima facie manufacturer liability in having failed to provide them." J.A. 51. It said nothing about what effect, if any, a decision *not* to issue a regulation would have on those lawsuits.

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

Id. The Coast Guard Letter added, however, that the agency would "continue to collect and analyze accident data for changes and trends . . . [and] review and retain any information made available regarding development and testing of new propeller guarding devices . . ." *Id.* At no point did the Coast Guard Letter -- or anything else issued by the Coast Guard -- indicate that the agency intended to ban state regulation with respect to propeller guards, or to preempt common-law claims relating to a manufacturer's failure to install propeller guards in its boats.

The Coast Guard's decision not to regulate propeller guards was not the product of any formal rulemaking proceeding and did not result in any regulatory action. The Coast Guard Letter describing the agency's decision not to regulate was not exposed to public notice and comment and it was never published in the *Federal Register*. Thus, there was no attempt to conform to the notice-and-comment rulemaking requirements of the Administrative Procedure Act. *See* 5 U.S.C. § 553 (1994). To date, there is still no federal regulation with respect to propeller guards, and their use is neither mandated nor prohibited by federal law.

B. The Proceedings Below.

On June 6, 1993, petitioners' daughter, Kathryn Lewis, was thrown from a passenger boat and killed by the unguarded

propeller of an engine manufactured by respondent Brunswick Corporation. Her parents sued respondent for common law negligence, product liability, and fraudulent misrepresentation, alleging primarily that the engine should have had a propeller guard. The district court granted respondent' motion for summary judgment on the ground that petitioners' common-law claims are preempted by the Boat Safety Act. Petitioners' Appendix ("P.A.") 26-32. The Eleventh Circuit affirmed, holding that, although the Act does not expressly preempt common-law claims, petitioners' claims are impliedly preempted because, if permitted to go forward, they would conflict with the Coast Guard's decision *not* to issue a regulation requiring propeller guards on all passenger boats. P.A. 3, 24-25.

SUMMARY OF ARGUMENT

In determining whether a state cause of action is preempted by federal law, a court's sole task is to ascertain the intent of Congress. This determination of Congressional intent is not made in a vacuum; rather, it is informed by a strong presumption against preemption that can be overcome only by a clear manifestation of Congressional intent to the contrary.

Seen in this light, the lower court clearly erred in finding petitioners' common-law claims preempted by the Boat Safety Act. First, as a threshold matter, there can be no finding of preemption here *because the Coast Guard has not issued any regulation regarding propeller guards*. Instead, after an internal review that never reached the rulemaking stage, the agency decided that regulatory action was not warranted at that time. Finding preemption under this circumstances is squarely at odds with *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), where this Court held that federal regulatory inaction does not preempt the States' power to act.

Even assuming, however, that the Coast Guard's decision not

to regulate propeller guards could preempt the States' power to regulate, it still would not preempt petitioners' common-law claims. The reason is simple: the Boat Safety Act makes clear that Congress did not intend to preempt *any* common-law claims. The language of the preemption provision shows that Congress merely intended to preempt state *legislative* or *administrative* safety standards that are not identical to federal safety standards, and not to preempt common-law tort actions. *See* 46 U.S.C. § 4306. The Act's savings clause, moreover, states in sweeping terms that "compliance with standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). Both the plain language of this "anti-preemption" provision and its legislative history make plain that petitioners' claims are expressly *preserved*, not preempted.

That being so, the Eleventh Circuit erred in even considering whether petitioners' claims are impliedly preempted by the Act. This Court has made clear that, where Congress has spoken directly and clearly on the issue of preemption -- as it did in the Boat Safety Act -- there can be no finding of implied preemption. Because the Act contains both an express preemption provision and an express "anti-preemption" provision manifesting a Congressional intent *not* to preempt, any inquiry into implied conflict preemption is precluded.

In any event, there is no implied conflict preemption here since petitioners' claims do not conflict with the Coast Guard's decision *not* to regulate propeller guards. Implied preemption only lies where it is impossible for a private party to comply with both state and federal requirements or where state law would frustrate the full purposes and objectives of Congress. "Impossibility" is not an issue here, because federal law imposes no requirements whatsoever regarding propeller

guards. Thus, respondent can do whatever is necessary to comply with Georgia law -- including compensating petitioners for their injuries -- without running afoul of federal law. Similarly, petitioners' claims would not "frustrate" Congress' purposes, since a federal decision *not* to regulate propeller guards in no way conflicts with a common-law claim that a specific engine design was defective because it lacked a propeller guard. Moreover, a claim that a specific boat engine is unsafe because it lacks a propeller guard is entirely consistent with the central goal underlying the Act: improving boat *safety*. Thus, there can be no holding of express or implied preemption in this case.

ARGUMENT

THE COAST GUARD'S DECISION NOT TO REGULATE PROPELLER GUARDS DOES NOT PREEMPT PETITIONERS' COMMON-LAW CLAIMS.

This case is governed by two bedrock legal principles regarding federal preemption. *First*, as this Court recently reaffirmed in *Medtronic v. Lohr*, 116 S. Ct. 2240, 2250 (1996), a party arguing that federal law preempts state law bears a heavy burden of overcoming the long-standing "presum[ption] that Congress does not cavalierly pre-empt state-law causes of action." This presumption against preemption is even stronger where, as in this case, preemption would displace the historic power of the States to protect the health and safety of their citizens. *See Rice v. Santa Fe Elevator Corp.*, 337 U.S. 218, 230 (1947). Moreover, where preemption of common-law claims would leave injured individuals without any state *or* federal remedy, which is the result sought by respondent, a court may find preemption only in the most compelling circumstances. *See English v. General Electric Corp.*, 496 U.S. 72, 87-90 (1990); *Silkwood v. Kerr-McGee Corp.*, 464

U.S. 238, 251 (1984).

Second, in determining whether a state cause of action is preempted by federal law, the Court's "sole task is to ascertain the intent of Congress." *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (plurality opinion). *See also Medtronic*, 116 S. Ct. at 2250 ("'[t]he purpose of Congress is the ultimate touchstone' in every preemption case.") (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). In *Medtronic*, this Court explained that "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." 116 S. Ct. at 2250-51. *Medtronic* added, however, that a court must also give close consideration to the "'structure and purpose of the statute as a whole,' . . . as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.* at 2251 (quoting *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 98 (1992)).

Applying these standards here, only one conclusion can be reached: there is no preemption of petitioners' claims under the Boat Safety Act.

I. Under *Myrick*, The Coast Guard's Decision Not To Regulate Propeller Guards Leaves The States Free To Act As They Wish.

Respondent would have this Court believe that the core question in this case is whether the Boat Safety Act expressly or impliedly preempts common-law damages claims. But a key threshold question is whether the Coast Guard has taken sufficient regulatory action with respect to propeller guards to even reach that question. Under *Freightliner Corp. v. Myrick*,

115 S. Ct. 1483 (1995), the answer is plainly "no."

Myrick considered whether a claim that a manufacturer was negligent for failing to install antilock brakes in tractor-trailer trucks was preempted by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1982) (the "Motor Vehicle Safety Act"), and by a federal motor vehicle safety regulation governing airbrake systems in buses, trucks, and trailers. 49 C.F.R. § 571.121 (S3) (1993) ("Standard 121").

As originally promulgated in 1974, Standard 121 required that all truck manufacturers install antilock brakes. This requirement was invalidated in *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 640 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978), which held that, although the braking performance of some trucks was improved by antilock brakes, "critical problems began with mass production of vehicles designed to meet the Standard." *Id.* at 641. Due to the unforeseen manufacturing difficulties encountered during mass production of antilock systems, the Ninth Circuit ordered NHTSA to suspend the antilock requirements of Standard 121. *Id.* at 643. In response, NHTSA added language to the regulation stating that the antilock brake provisions invalidated by *Paccar* "are not applicable to trucks and trailers." 49 C.F.R. § 571.121(S3).

In *Myrick*, the truck manufacturers argued that Standard 121 preempted common-law claims that their trucks were defective because they lacked antilock brakes. This Court disagreed, holding that there could be no preemption because "[t]here is no express federal standard addressing [antilock brakes] for trucks or trailers." 115 S. Ct. at 1487. In so holding, *Myrick* explicitly rejected the truck manufacturers' claim "that the absence of regulation itself constitutes regulation." *Id.* Mere regulatory inaction, said the Court, carries no preemptive force

whatsoever, especially where "there is no evidence that [the federal agency] decided that [the product] should be free from all state regulation . . .." *Id.*

Myrick mandates reversal of the decision below. In finding federal preemption of petitioners' common-law claims, the Eleventh Circuit embraced the very proposition that was rejected in *Myrick*: that "the absence of regulation itself constitutes regulation." *Id.* This ruling has the perverse effect of transforming a federal decision *not* to require propeller guards on all motor boats into an affirmative decision to *ban* any state regulation requiring a propeller guard on any motor boat, as well as any state common-law claim simply requiring a manufacturer to pay damages for failing to include a specific propeller guard on a specific boat. This result is contrary to *Myrick* and it flies in the face of numerous prior decisions of this Court holding that mere federal regulatory inaction, without more, does not imply an authoritative federal determination that the area is best left unregulated. *See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 496, 503-04 (1988) (federal inaction alone does not have preemptive effect); *Arkansas Elec. Co-Op v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (regulatory inaction only has preemptive force where Congress has made clear that its intention is "to fill a regulatory gap, not to perpetuate one.") (footnote omitted).

In addition, here, as in *Myrick*, "there is no evidence that [the federal agency] decided that [the product at issue] should be free from all state regulation . . .." 115 S. Ct. at 1487. As explained above, the Coast Guard's decision not to even begin drafting a *federal* regulation requiring propeller guards stemmed from its "many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation." J.A. 163. The agency never even

considered whether some or all *state* regulations (much less some or all common-law claims) were desirable. The Coast Guard also never considered, much less decided, whether there *some* technology appropriate for use in *some* boats. Rather, the agency merely found that there was no technology appropriate for a *national*, across-the-board regulation applicable to *all* types of boats. This determination is entirely consistent with -- and leaves the States free to adopt -- state regulations mandating propeller guards on specific boats or on boats used for a particular purpose. It is also, of course, entirely consistent with a finding that respondent acted negligently under Georgia common law by failing to install a propeller guard on the boat engine that killed Kathryn Lewis.

The Eleventh Circuit nonetheless distinguished *Myrick* on the theory that, in contrast to the Motor Vehicle Safety Act, the Boat Safety Act gives the Coast Guard exclusive authority to issue safety standards:

> While an absence of regulation under the [Motor] Vehicle Safety Act does not prevent states from regulating motor vehicle safety standards, an absence of federal regulation under the [Boat Safety Act] means that no regulation, state or federal, is appropriate. [*Myrick*] is distinguishable for that reason.

P.A. 20. Based on its view that the Boat Safety Act only permits state regulations that are identical to federal standards, the Eleventh Circuit held that the Coast Guard's decision not to issue a regulation requiring propeller guards was more than just regulatory inaction, but rather demonstrated an intention to "mandate[ ] an absence of both federal and state propeller guard requirements." *Id.* (citations omitted).

This argument rests on the radical -- and wholly unsupported

-- notion that the Boat Safety Act essentially preempts the entire field of boat safety regulation. It is well established that courts may not infer Congressional authority to supercede the "historic police powers of the States . . . unless that was the clear and manifest purpose of Congress." *Rice*, 337 U.S. at 230. "Federal occupation of a field of commerce may not be deemed preemptive of state regulatory power in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion or that Congress has unmistakenly so ordained." *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963).

Here, there is no plausible argument that Congress has "unmistakenly ordained" its intent to preempt the entire field of state regulatory power with respect to boat safety. To begin with, the Boat Safety Act's express preemption clause contains no language barring States from regulating in the absence of federal action. Rather, it simply provides that "a State . . . may not establish . . . a [boat] safety standard . . . that is not identical to a regulation prescribed under section 4302." 46 U.S.C. § 4306. This language merely limits what a State can do in the event the Coast Guard *has* prescribed a regulation (*i.e.*, the State is limited to prescribing an identical standard); it says nothing about what a State can or cannot do where -- as here -- the Coast Guard has decided *not* to take any regulatory action. At the same time, another provision of the Boat Safety Act limits the Coast Guard's authority to prescribing "minimum safety standards" (46 U.S.C. § 4302(a)(1)) -- language that this Court has previously construed as *not* evidencing Congressional intent to preempt all safety regulation in a particular field. *See Florida Lime*, 373 U.S. at 147-48.

Of course, language accomplishing total preemption of the regulatory field would have been easy to fashion had Congress so intended. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S.

85, 96-101 (1983) (field preemption where federal law expressly preempted "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA); *Rice*, 337 U.S. at 233-35 (field preemption where federal law expressly states that "the power, jurisdiction, and authority conferred upon [the agency] under this Act shall be exclusive with respect to all persons securing a license hereunder so long as said language remains in effect"). The absence of any such language in the Boat Safety Act demonstrates that Congress did not expressly preempt the entire field of state regulation in the boat safety area.

Nor could there be any claim that "the nature of the regulated subject matter" -- boat safety -- "permits no other conclusion" than that Congress intended to bar all state regulation in the area. *Florida Lime*, 373 U.S. at 142. Even the lower court recognized that the Boat Safety Act regulates an area (safety) that "historically has been regulated by the states through their police powers . . .." P.A. 14. This is therefore not a case where Congressional intent to preempt state law may be inferred from a "dominant federal interest" in the field. *Compare Hillsborough County, Fla. v. Auto Med. Labs.*, 471 U.S. 707, 718 (1985) (no dominant federal interest in regulating health and safety sufficient to support implied preemption of entire field of state regulation), *with Boyle v. United Technologies Corp.*, 487 U.S. 500, 505-06 (1988) (implying intent to preempt field from uniquely federal interest in liability of independent contractors performing work for federal government), *and Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) (implying intent to preempt field from dominance of federal interest in foreign affairs).

Nor is this a case where the "scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation."

Hillsborough, 471 U.S. at 713 (quoting *Rice*, 331 U.S. at 230). The Act itself does not require the Coast Guard to prescribe *any* regulations governing boat safety; instead, it merely states that "[t]he Secretary *may* prescribe regulations . . . establishing minimum safety standards for recreational vessels . . .." 46 U.S.C. § 4302(a) (emphasis added). The fact that the agency has issued some regulations in the area of boat safety (although not with regard to propeller guards!) is hardly sufficient to infer Congressional intent to preempt the entire field of boat safety. *See Hillsborough*, 471 U.S. at 718 ("[w]e are even more reluctant to infer preemption from the comprehensiveness of regulations than from the comprehensiveness of statutes").

Under the rubric of its "implied conflict preemption" analysis, however, the lower court held that Congress must have intended to preempt all state regulation because any other result would undermine "the need for uniformity applicable to vessels moving in interstate commerce." P.A. 19 (quoting S. Rep. No. 92-248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. at 1341).[3] This conclusion fails in light of the overriding purpose of the Boat Safety Act: to stem the "alarming" loss of life from boat accidents by requiring compliance with minimum safety standards. *See* S. Rep. No. 92-248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. at 1334. Given this goal, it would have made no sense for Congress to have wiped out all existing state regulation of boat safety in one fell swoop, leaving *no* standards in effect unless and until the Coast Guard saw fit to promulgate minimum safety regulations.

---

[3] We note that it was error for the lower court to reach the question of implied field preemption in light of Congress' clearly expressed intention *not* to preempt all state regulation in the boat safety field. As explained below at II.B., a finding of implied preemption is prohibited where Congress' express language provides a "reliable indicium" of its intent with respect to preemption.

In short, by relying on one sentence in the Boat Safety Act's legislative history regarding a need for uniformity in boat safety standards, the Eleventh Circuit read the word "Safety" out of the Boat Safety Act. In light of Congress' overriding focus on actually *improving* boat safety -- and given the especially strong presumption against preemption of an entire field of state regulation -- that interpretation cannot stand. Thus, the lower court's attempt to distinguish *Myrick* on the theory that the Boat Safety Act -- unlike the Motor Vehicle Safety Act -- preempts the entire regulatory field is unavailing.

At bottom, the Coast Guard's decision not to regulate propeller guards is markedly similar to the fate of antilock brake regulation described in *Myrick*. In both cases, the absence of regulation was due to a determination that the current state of technology did not warrant a universal regulatory solution to a safety problem. In *Myrick*, that decision was made by the Ninth Circuit and then memorialized in the amendment to Standard 121 eliminating the antilock brake requirement for trucks and trailers; in this case, the decision not to regulate was made by the agency in the first instance. But the result in both instances was the same: an absence of any federal regulation mandating *or* prohibiting the use of the technology in question. *Myrick* makes clear that federal preemption simply does not exist under these circumstances. As a result, this Court need not reach the question of whether federal regulations actually issued under the Boat Safety Act would preempt state common-law claims.

II. Even If The Coast Guard's Decision Not To Regulate Propeller Guards Preempts State Regulation, It Does Not Expressly Or Impliedly Preempt Petitioners' Common-Law Claims.

A. Petitioners' Claims Are Not Expressly Preempted Because Congress Expressly Preserved Them.

Even assuming that the Coast Guard's decision not to regulate could have preemptive force under the Boat Safety Act (which it cannot), the Eleventh Circuit's finding that Congress *impliedly* preempted petitioners' common-law claims is in error for a simple reason: the Act makes crystal clear that Congress did not intend to preempt *any* common-law damages claims. Indeed, the two provisions of the Boat Safety Act that set forth Congress' intent with respect to preemption -- the preemption provision (46 U.S.C. § 4306) and the savings clause (46 U.S.C. § 4311(g)) -- reveal that common-law claims are *expressly preserved*, not preempted. That being so, the lower court erred in even considering whether -- much less finding that -- such claims are impliedly preempted.

1. The Boat Safety Act's Preemption Provision Does Not Encompass Common-Law Claims.

To begin with, the Act's express preemption clause does not encompass common-law claims. It provides that, subject to certain exceptions, "a State or political subdivision of a State may not establish, continue in effect, or enforce a *law or regulation* establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under section 4302 of this title." 46

U.S.C. § 4306 (emphasis added). As the Texas Supreme Court held in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), there are numerous reasons why the phrase "law or regulation" in this section, standing alone, should not be read to include common-law claims at all. *See id.* at 249-50. Even the broadest reading of that phrase ultimately breaks down, however, in light of other aspects of the preemption provision that make clear that Congress never intended to preempt tort suits against boat manufacturers.

First, the preemption provision merely prohibits a State from imposing a nonidentical "law or regulation establishing . . . a performance or other *safety standard* or imposing a requirement for associated equipment . . .." 46 U.S.C. § 4306 (emphasis added). "Safety standard" is a term used at various places in the Act to refer to the *administrative* standards the Coast Guard is authorized to adopt pursuant to Section 4302. *See, e.g., id.* at § 4302(a)(1); § 4302(a)(2); § 4304; § 4311(f)(1); § 4311(f)(2). The use of the same term to refer to the state norms that may be displaced by a Federal "safety standard" is, under normal rules of statutory construction, indicative that the term is meant to have the same meaning. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (it is a "basic canon of statutory construction that identical terms within an Act bear the same meaning") (citing cases); *Morrison-Knudsen Const. v. Director, Office of Workers Comp. Programs*, 461 U.S. 624, 633 (1983) ("a word is presumed to have the same meaning in all subsections of the same statute"). *See also Medtronic*, 116 S. Ct. at 2252 (plurality opinion) (citing other uses of the term "requirements" throughout statute to demonstrate that Congress merely intended to preempt "enactments of positive law by legislative or administrative bodies, not the application of general rules of common law by judges and juries"). Thus, the only sensible reading of the

Act's preemption provision is that a "safety standard" promulgated under the Act (or a requirement for equipment associated with such a standard) will only preempt a state legislative or administrative "safety standard" that is not identical to the federal standard.

Second, if Congress intended the preemption provision to apply to common-law claims, it would likely have chosen words that more clearly did so -- particularly since it referred specifically to common-law liability in the Boat Safety Act's savings clause. The term "safety standard" is hardly a clear reference to common-law claims. *See Medtronic*, 116 S. Ct. at 2251 (plurality opinion) ("if Congress intended to preclude all common-law causes of action, it chose a singularly odd word ['requirement'] with which to do it. The statute would have achieved an identical result, for instance, if it had precluded any 'remedy' under state law relating to medical devices.").

Third, the preemption provision only applies to a safety standard "establish[ed], continue[d] in effect, or enforce[d]" by a "State or a political subdivision of a State." Construing an award of damages to a tort plaintiff as "establishing, continuing in effect, or enforcing" a boat safety standard is at odds with this Court's oft-stated "assum[ption] 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). The duties relied on by tort claimants are general duties under the common law that have evolved over hundreds of years. While a jury award of damages would represent confirmation of a pre-existing common-law duty -- for instance, the duty to act non-negligently -- only an inept grammarian would describe an award of damages in a tort suit as "establishing, continuing in effect, or enforcing" a boat safety standard or other regulation. On the other hand, it is common parlance to say that a previously "established" statute or regulation "continues in

effect" or is "enforced."

Fourth, it makes no sense to construe the term "State or a political subdivision of a State" as encompassing a jury (or judge) in a tort case. Political subdivisions of states, such as counties and towns, often enact health and safety laws. Thus, it was logical for Congress to include "political subdivisions" in the coverage of Section 4306, lest there be some ambiguity as to the breadth of the term "State." At the same time, no one would ordinarily describe an award of damages by a jury or judge as being issued by a "State or political subdivision of a State." And it is impossible to say that a *federal* jury or judge is in any sense a "State or political subdivision thereof." Thus, the Boat Safety Act's express preemption provision cannot reasonably be read to encompass common-law claims.

2. The Boat Safety Act's Savings Clause Expressly Preserves Common-Law Claims.

If any doubt remained as to the inapplicability of the Boat Safety Act's express preemption provision to common-law claims, it would be dispelled by the Act's express *anti*-preemption provision -- the savings clause -- which plainly and unambiguously *preserves* all common-law claims. It states in simple and straightforward terms: "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g).

On its face, the savings provision is sweeping and unambiguous. "Compliance with standards, regulations, or orders prescribed under this chapter" is a phrase that does not admit of qualification. It cannot be read to mean only compliance with certain federal safety standards, or to except from its scope safety standards that deal with the particular

question of design or performance at issue in a given common-law action. Similarly, the phrase "does not relieve a person from liability at common law or under State law" does not on its face admit of qualification. "[L]iability at common law or under State law" is all-inclusive. That phrase cannot fairly be read to mean that the Boat Safety Act provides any basis for exempting any defendant from any common-law liability. *See United States v. James*, 478 U.S. 597, 604 (1986) (the federal statute "outlines immunity in sweeping terms: 'No liability of *any* kind shall attach to or rest upon the United States for *any* damage from or by floods or flood waters at *any* place.' It is difficult to imagine broader language.") (emphasis in original).

Respondent nonetheless argues that the savings clause was merely intended to show "Congress' intent not to occupy the entire field of boat safety, so that common-law claims could continue to be brought in areas not covered by a federal safety standard." *See* Brief for Respondent in Opposition to Petition for Writ of *Certiorari* at 13. This argument fails for two reasons. First, as explained above, other provisions of the Boat Safety Act make crystal clear that Congress did *not* intend to preempt the field by prohibiting States from regulating in the absence of any federal safety standard. That being the case, there would have been no reason for Congress to carve out a special exception from field preemption for common-law claims.

Second, respondent's argument conflicts with the language of the savings clause itself, which broadly states that "[c]ompliance with . . . standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). Under respondent's theory, this provision is merely designed to show that common-law damages claims survive field preemption in cases where the Coast Guard has not taken any regulatory action. But the

savings clause is worded much more broadly, and specifically applies in cases where the agency *has* issued a "standard[ ], regulation[ ], or order[ ]." In fact, it specifically provides that common-law claims may be brought *despite* a manufacturer's compliance with federal standards. Respondent's contrary interpretation simply makes no sense in light of the words chosen by Congress.

The Boat Safety Act's legislative history confirms that Congress enacted the savings clause to make crystal clear that common-law claims are not preempted under any circumstances. According to the Senate Report, the savings clause was

> intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. *The purpose of the section is to assure that in a product liability suit mere compliance with the minimum standards promulgated under the Act will not be a complete defense to liability*. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value.

1971 U.S.C.C.A.N. at 1352 (emphasis added). This explanation hammers home what the language of the savings clause already reveals: that Congress did not intend to immunize boat manufacturers from any "product liability suits" when it passed the Boat Safety Act. To the contrary, Congress plainly intended to permit such suits to go forward even in cases where a manufacturer could demonstrate compliance with a minimum federal standard.

In short, the Boat Safety Act expressly and unequivocally preserves all common-law claims. Some courts have

nonetheless rejected this result on the theory that Congress could not logically have intended to permit common-law claims to proceed, despite their "regulatory effect," when state regulations addressing the same matters would be preempted. *See, e.g., Carstensen v. Brunswick Corp.*, 49 F.2d 430, 432 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 182 (1995); *Mowery v. Mercury Marine*, 773 F. Supp. 1012, 1016 (N.D. Ohio 1991). Congress, however, has repeatedly preserved common-law claims, despite their arguably regulatory effect, while preempting direct state regulation -- and this Court has repeatedly recognized the reasonableness of this approach. For example, in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), this Court held:

> The effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an additional award provision. Appellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation. We believe Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not. *Cf. Silkwood v. Kerr McGee Corp.*, 464 U.S. at 256 (Congress was willing to accept regulatory consequences of application of state tort law to radiation hazards even though direct state regulation of safety aspects of nuclear energy was pre-empted).

Id. at 185-86 (footnote omitted). *See also Cipollone*, 505 U.S. at 518 ("there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law [damages] actions.")

This approach, moreover, makes good sense. As respondent well knows, and Congress certainly understood when it passed

the Boat Safety Act, regulatory agencies are notoriously subject to capture by those they are intended to regulate and, even in the best circumstances, move laboriously and cautiously. Given the purpose of the Boat Safety Act, it was unquestionably reasonable for Congress to preempt state legislative and administrative standards that are different than federal regulations, but continue to allow the common-law tort system to play its traditional role of prompting the federal government and boat manufacturers to set higher standards for safety features. That is precisely the approach reflected in the Act, which explicitly preserves all common-law claims.

B. The Question Of Implied Preemption Cannot Be Reached Because Congress Unambiguously Preserved Common-Law Claims.

Despite Congress' clear language expressly preserving common-law claims, the Eleventh Circuit went on to find that petitioners' claims are *impliedly* preempted by the Coast Guard's decision not to require propeller guards on all passenger boats. *See* P.A. 24-25. This approach violates this Court's teaching in *Cipollone* that, where Congress has spoken directly and clearly on the preemption issue at stake -- as it did in the Boat Safety Act -- a court is *prohibited* from considering any doctrine of implied preemption. The seven-member majority stated:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation.

505 U.S. at 517 (quotations deleted). This approach, the Court said "is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted." *Id.*

In *Myrick*, this Court again affirmed this principle, but clarified that an express preemption clause, standing alone, does not automatically preclude implied preemption; it only does so when it provides a "reliable indicium of congressional intent" with respect to preemption. The Court explained:

> The fact that an express definition of the pre-emptive reach of a statute "implies" -- *i.e.* supports a reasonable inference -- that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption . . . At best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule.

115 S. Ct. at 1488.

As if these teachings were not clear enough, *Medtronic* reiterated that there can be no resort to implied preemption in cases where -- as here -- Congress has expressly spoken on the issue of preemption:

> As in *Cipollone*, we are presented with the task of interpreting a statutory provision that expressly pre-empts state law. While the pre-emptive language of [the statute] means that we need not go beyond that language to determine whether Congress intended the MDA to pre-empt at least some state law, we must nonetheless identify the domain expressly pre-empted by that language.

116 S. Ct. 2250 (citations and quotations omitted). While the members of the Court disagreed vehemently on the meaning of Congress' words, they all agreed that, since Congress had expressly stated its intent with respect to preemption, only *express* preemption analysis could be pursued.

Given these teachings, and Congress' unequivocal preservation of all common-law claims in the Boat Safety Act, the result is clear: implied preemption arguments cannot even be considered in this case. The Eleventh Circuit's holding that the Act impliedly preempts petitioners' claims was plain error on this ground alone, and should be reversed.

Respondent will undoubtedly defend the lower court's decision to reach implied preemption on the ground that the Boat Safety Act's express preemption provision is not a "reliable indicium of Congressional intent." *Cipollone*, 505 U.S. at 517. Even assuming that the Act's express preemption provision, standing alone, does not meet the *Cipollone* test, Section 4306 does *not* stand alone. Rather, as explained above, the Act's savings clause provides a reliable -- indeed, a *conclusive* -- indicium of Congress' intent to preserve *all* common-law claims. Accordingly, there is no basis for considering any implied preemption arguments here. The express preemption inquiry should be the beginning and the end of the analysis.

C. Even Assuming That Implied Preemption Analysis Can Be Reached Here, Petitioners' Claims Are Not Preempted Because They Do Not Conflict With Federal Law.

Even assuming, however, that implied preemption analysis is proper in this case, there is no preemption here since petitioners' claims do not conflict with the Boat Safety Act or

with the Coast Guard's decision *not* to regulate propeller guards.[4] As *Myrick* explained, implied conflict preemption only arises when there is an "actual conflict" between federal and state law -- either because it would be "impossible for a private party to comply" with both or because the state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." 115 S. Ct. at 1487.

Regarding the former, as in *Myrick*, "it is not impossible for [the manufacturer] to comply with both federal and state law because there is simply no federal standard for a private party to comply with." *Id.* at 1488. Once again, the bottom line in this case is that *there is no federal regulation regarding propeller guards*. As the Coast Guard has not enacted any standard either requiring or prohibiting propeller guards on boats, respondent would not run afoul of federal law by installing propeller guards on its boat engines. (Of course, jury verdicts finding it liable in this and other cases would not compel it to do any such thing, since respondent could always opt to compensate the plaintiffs for their injuries rather than avoid such suits altogether by installing propeller guards.) In any event, given the absence of any federal regulation regarding propeller guards, there can be no claim of impossibility here.

The Eleventh Circuit's contrary conclusion is once again

---

[4] As a threshold matter, the Eleventh Circuit compounded its initial error (considering implied preemption in the first place) by refusing to apply any presumption against implied conflict preemption. *See* P.A. 15. This holding is flatly wrong. To cite but one of myriad potential examples, in *Hillsborough*, 471 U.S. at 715, this Court rejected an implied preemption argument relying heavily on the presumption against preemption. This makes sense since, if the presumption against preemption is to be employed when interpreting Congress' express language, it follows logically that a court should be even more cautious in finding preemptive intent by implication from far less reliable indicators.

rooted in its erroneous "field preemption" theory. The lower court reasoned as follows: (1) the Boat Safety Act bars States from enacting *any* regulations except ones identical to federal standards; (2) the Coast Guard considered, but declined to issue, a federal standard requiring propeller guards on all boats; (3) given that the Act preempts the field of state regulation absent federal action, the Coast Guard must have intended for its regulatory *in*action to bar any state regulation governing propeller guards; and, therefore (4) it would be "impossible" for respondent to comply with both state and federal law. *See generally* P.A. 18-21. *See also* P.A. 24 ("because Congress has made the Coast Guard the exclusive authority in the area of boat and equipment safety standards, its position rejecting a propeller guard requirement takes on the character of a ruling that no such requirement may be imposed.").

This theory fails for the simple reason that Congress manifestly did *not* intend to preempt the field of boat safety when it passed the Act into law. *See supra* at 12-16. That being so, the Coast Guard had no basis for assuming or intending that its decision not to regulate propeller guards would affect the States' ability to regulate propeller guards. Moreover, as explained above, there is no evidence that the Coast Guard thought that propeller guards should be banned. To the contrary, all the agency decided was that, due to the lack of "universally acceptable" propeller guard technology suitable for all engines, it was premature to issue a nationwide standard *requiring* propeller guards on every passenger boat in the country. *See* J.A. 163. The absence of a universally appropriate propeller guard does not mean, however, that *no* propeller guard should be required on *any* boat. In any event, there is no hint in the record that the Coast Guard ever decided to immunize all boat manufacturers from liability for failing to install propeller guards on specific boats. Thus, there can be no claim that it would be impossible for respondent to comply with

both the Coast Guard's regulatory scheme and a jury verdict finding it liable in this case.

Nor can there be any serious claim that permitting lawsuits like petitioners would "stand[ ] as an obstacle to the accomplishment and execution of the full purposes of Congress." *Myrick*, 115 S. Ct. at 1487. To again use the words of *Myrick*, "[a] finding of liability against petitioners would undermine no federal objectives or purposes with respect to [propeller guards], since none exist." *Id.* at 1488. Here, too, the absence of any federal standard regarding propeller guards is the end of the matter.

The Eleventh Circuit nonetheless held that petitioners' claims are "preempted by implication" because they would "conflict with [the Boat Safety Act's] grant of exclusive regulatory authority to the Coast Guard." J.A. 163. This "conflict," however, is based on the lower court's misunderstanding of the Act: as explained above, Congress never granted "exclusive regulatory authority" to the Coast Guard. Nor would permitting petitioners' claims "conflict with the regulatory uniformity purpose of the [Act]." *Myrick*, 115 S. Ct. at 1138. In reality, the Act has no such stated goal. And, although the legislative history references uniformity as one of Congress' goals, the Senate Report reveals that the main purpose behind the Boat Safety Act was -- as the name implies -- boat *safety*. *See* 1971 U.S.C.C.A.N. at 1333-35. A jury verdict in petitioners' favor would be perfectly consistent with -- and substantially further -- that overriding goal. Moreover, even if there was a federal regulation in place preempting state *regulation* of propeller guards, state common-law claims still would not be preempted. In any event, as the Texas Supreme Court held in *Moore*, "the savings clause reflects that Congress was willing to tolerate some tension between the concept that uniform safety regulations should be established at the federal level and the

concept that a state may nevertheless award tort damages for unsafe products. *Cf. Silkwood*, 464 U.S. at 256." 889 S.W.2d at 252. Thus, any claim that an alleged interest in regulatory uniformity is sufficient to trigger implied preemption of common-law claims should be rejected.

In sum, given the strong presumption against federal preemption of common-law claims, Congress' explicit preservation of common-law claims in the Boat Safety Act, and the Coast Guard's decision *not* to promulgate any federal regulation regarding propeller guards, the decision below cannot stand. Petitioners' common-law claims are not preempted.

CONCLUSION

For these reasons, the decision below should be reversed.

Respectfully submitted,

Leslie A. Brueckner
(Counsel of Record)
Arthur H. Bryant
Trial Lawyers for Public Justice, P.C.
1717 Massachusetts Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 797-8600

Counsel for *Amicus Curiae*
Trial Lawyers for Public Justice, P.C.

December 29, 1997